IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

REPLY BRIEF FOR THE PETITIONER

STEVEN W. FISHER
BARRY GENE RHODES
RHODES & FISHER
16 Court Street
Suite 1210
Brooklyn, New York 11241
212/624-3784

Counsel to the Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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I.

BECAUSE OF THE UNIQUE CONSTITUTIONAL FUNCTION OF A TRIAL JUDGE, THE LANGUAGE OF *CORBITT V. NEW JERSEY* (___ U.S. ___ , 99 S. CT. 492 [1978]), RELIED ON BY THE RESPONDENT, HAS NO BEARING ON THE QUESTIONS AT BAR.

Arguing that "the direct participation of *any* judge in plea negotiations. . . does not, standing alone, violate due

process," (Resp. Brief at 20), the respondent broadly asserts:

> This Court . . . at least tacitly approved some degree of judicial participation in *Brady v. United States*, . . ., and has expressly approved the offer of substantial benefits to *encourage* pleas. (*Corbitt v. New Jersey*, . . .) (Resp. Brief at 20.)

The juxtaposition of this language, however, gives rise to a mistaken notion of the holdings of the two cited cases.

First, although *Brady*[1] does make passing reference to "any commitments made. . . by the court," it does not suggest at what stage such commitments may properly be made. Because the petitioner maintains only that a trial judge may not constitutionally participate actively in the give-and-take of the negotiations for a guilty plea, the *Brady* language offers little assistance in the resolution of the narrow questions at bar.

Second, as a matter of basic constitutional law, the holding of *Corbitt*[2] can have no legitimate application to a trial judge. The Court wrote in *Corbitt* that

> . . . there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.
> (____ U.S. at ____ , 99 S. Ct. at 497)

Hence, the majority opinion suggested quite clearly that, at least within a very limited framework, benefits in return for a plea may be offered by the State through a statutory scheme enacted by its legislature. *See, e.g.*, ____ U.S. at ____ , 99 S. Ct. at 500 n. 15. Similarly, in an earlier case, the Court found no constitutional violation when the State, this time through

[1] 397 U.S. 742, 755 (1970).

[2] ____ U.S. ____ , 99 S. Ct. 492 (1978).

the prosecutor, encouraged a defendant to plead guilty by presenting him with the unpleasant alternatives of foregoing trial or facing additional charges carrying mandatory life imprisonment. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

The essence of the respondent's position here is that these principles ought to be extended to permit the State in the same way to employ its trial judges to encourage defendants to tender guilty pleas. This argument must fail, however, because it takes no account of the very special role a trial judge plays in our system of criminal justice.

In a criminal case, a trial judge is not to be counted among the representatives of the State. Quite to the contrary, his function is to stand independently between the State and the accused; his responsibility is to insure the accused a fair hearing and to afford him all of the constitutional safeguards to which he is entitled. *See, e.g., United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (Weinfeld, D.J.); *cf. Rogers v. State*, 243 Miss. 219, 136 So. 2d 221, 335 (Sup. Ct. Miss. 1962).

Unlike a prosecutor, a trial judge may not assume an adversarial role and attempt to encourage a defendant to plead guilty by independently offering him substantial benefits in return for the plea. The respondent's suggestion to the contrary simply misapprehends the fundamental constitutional function of a trial judge and finds no support in either *Brady* or *Corbitt*.

II.

THE RESPONDENT'S IMPRECISE ANALYSIS OF *UNITED STATES V. JACKSON* (390 U.S. 570 [1968]) HAS LED HIM TO MISAPPLY ITS PRINCIPLES TO THE QUESTION AT BAR.

The petition has argued that this Court's analysis in *United States v. Jackson*[3] supports the proposition that due process requires trial judges to refrain from actively participating in pre-plea negotiations. The respondent maintains otherwise, but in doing so he has misconstrued both the penalty requirement of *Jackson* and the test of necessity which is the very essence of the holding of that case.

A. The Penalty Requirement of *Jackson*

The respondent states:

> For a due process violation to be found under *Jackson*, three factors must be present: A penalty which attaches to the assertion of a right; the chilling effect on the assertion of that right as an incident of the penalty; and, an alternative means of achieving a legitimate goal which renders the penalty needless. (Resp. Brief at 27.)

He then argues that,

> In the case at bar, the petitioner has failed to identify the penalty which is imposed upon a defendant who asserts his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a trial when the same judge participates in the plea negotiations and presides at trial. (*Id.* at 28.)

[3]390 U.S. 570 (1968).

The respondent's analysis is flawed because his view of the penalty requirement of *Jackson (see,* Resp. Brief at 28) is far too narrow. For example, even under the statute struck down in *Jackson,* it was entirely possible for a defendant to escape the death penalty after conviction upon a jury verdict, and therefore to suffer no actual penalty as an incident of his demand for a jury trial. The defect in the statute was not that it inevitably exacted a penalty for the assertion of a right but rather that it gave rise to the *potential* for penalty - a potential which could be avoided by a defendant who agreed to forego a jury trial. The due process violation lay in the fact that that potential for penalty, which advanced no legitimate State interest, naturally entered the defendant's decision-making process and needlessly encouraged him to waive his constitutional right to a trial by jury.

Similarly, as the clear weight of legal opinion recognizes, a potential penalty, incident to the assertion of the right to trial, arises whenever a trial judge participates in plea negotiations. That potential penalty, which looms over the negotiations, is the prospect of a trial conducted under hostile judicial influence and the possibility of a punitive sentence in the event of conviction.

It is undoubtedly true, of course, that a defendant who has engaged in unsuccessful plea negotiations with a trial judge may nevertheless be afforded a fair trial without punitive sentencing upon conviction. However, it is the *potential* for penalty that affects the defendant's decision-making process and needlessly encourages him to plead guilty. (*See, e.g., United States v. Werker,* 535 F.2d 198 [2nd Cir. 1976], *cert. denied,* 429 U.S. 926.) That potential satisfies the penalty requirement of *Jackson.*

B. The Test of Necessity

In an attempt to discount the seriousness of the potential for prejudice inherent in a trial judge's participation in plea negotiation, the respondent observes:

> Judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. A court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Due process does not prohibit the court from presiding at trial in either example, nor does due process require a finding that the defendant's plea of guilty was involuntary because he believed that the court could no longer be impartial. . . .
>
> (Resp. Brief at 15.)

The petitioner agrees that, in much the same way that a trial judge's participation in plea bargaining would encourage a defendant to plead guilty, so too might the prospect of trial before a judge who has knowledge of inadmissible inculpatory evidence or who is aware of the defendant's previous conviction for the same offense.[4] The distinction, however, lies at the very heart of the *Jackson* holding: not all encouragement of guilty pleas is constitutionally unacceptable; rather, due process is offended only by the *needless* encouragement of the waiver of fundamental rights. *Cf.*,

[4]It could well be argued, however, that the encouragement to plead guilty attendant to judicial participation is greater since the defendant might reasonably fear that rejection of the plea offer will be viewed by the judge who made it as a personal rebuff. *Cf.* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (App. Draft 1968), Commentary, at 73.

Corbitt v. New Jersey, ____ U.S. ____, ____, 99 S. Ct. 492, 497 n.9 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17, 44 (1973) (MARSHALL, J. dissenting).

A defendant who seeks the suppression of evidence *must* address his motion to a judge who is then obliged to resolve it. Likewise, a defendant who successfully seeks appellate reversal and re-trial *must* submit to further proceedings conducted by a judge. Hence, in both analogies offered by the respondent, the judicial involvement, which may later prove a source of encouragement to plead guilty, is not only necessary but essential.[5]

[5]It may be asked, however, whether by extension of the petitioner's *Jackson* analysis, due process should require that the judge who presides at trial be other than the judge who entertained the suppression motion or who presided at an earlier trial subsequently reversed. Although the question need not be reached here, it may prove instructive to examine it against the *Jackson* concept of "needless encouragement."

Whether a practice is "needless" within the meaning of *Jackson* should be determined by balancing the danger the practice portends against the facility with which it can be revised. *See*, Note, *Plea Bargaining: The Case for Reform*, 6 U.RICH. L. REV. 325, 330 (1972). *Cf. Richardson v. Perales*, 402 U.S. 389, 410 (1971). The danger present in the analogies offered by the respondent is the same as the danger inherent in judicial participation in plea bargaining, *viz.*, that the defendant will be encouraged to plead guilty because of the fear that the trial judge, although assumed to be a man of conscience and intellectual discipline (*United States v. Morgan*, 313 U.S. 409, 521 [1941]) will nonetheless, either intentionally or subconsciously, allow his independent knowledge of damaging evidence or circumstances to influence his discretionary trial rulings or sentencing function.

In the respondent's analogies, this danger could be avoided only by mandating the transfer of individual cases from judge to judge. This solution, broadly applied, would present considerable difficulties since, in the words of the respondent, "the administrative burdens and costs imposed on an already strained court system, particularly in the small and single-judge jurisdictions, would be substantial." (Resp. Brief at 23.)

In contrast, in the case of judicial participation in plea bargaining, the same danger could be easily overcome by simply requiring judges to

(continued)

Similarly, although judicial rejection of a plea agreement reached independently by the parties (*see,* Fed. R. Crim. Pro. 11[e]) might well influence a defendant's later decisions, no needless encouragement to plead guilty results. Ultimately a guilty plea *must* be tendered to a judge who must then act as he deems best in accordance with the responsibilities of his position. *Bonner v. Wyrick,* 563 F.2d 1293, 1298 (8th Cir. 1977). Hence, again, judicial involvement is essential.[6]

In marked contrast, however, the participation of a trial judge in the actual negotiations for a guilty plea is entirely unnecessary. Indeed it is almost universally discouraged and

(footnote continued from preceding page)

refrain from actively engaging in a process in which, according to the consensus of legal opinion, they should play no part in the first instance. Judges may indeed be men of intellectual discipline, but "[t]he disciplined judicial mind should not be subjected to any *unnecessary* strain; even the most austere intellect has a subconscious." *United States v. Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972) (emphasis supplied).

Finally, it should be noted that, contrary to the implication in the respondent's brief, (*e.g.*, at 23), the petitioner's argument is not wedded to any "substitute-judge" plan. Although the petitioner sees no constitutional objection to participation in plea negotiations by a judge who will not preside at trial (*cf., Commonwealth v. Rothman,* 222 Pa. Super. Ct. 385, 294 A.2d 783, 784-785 [1972] [Spaulding, J. concurring]; Note, *Plea Bargaining and the Transformation of the Criminal Process,* 90 HARV. L. REV. 564, 584 [1977]), he does not contend that the Conference Part concept employed in Kings County and elsewhere is *required* by due process. Petitioner argues only that a State is free to establish such procedures without offending constitutional principles, *See,* Note, *Judicial Participation in Guilty Pleas - A Search for Standards,* 33 U. PITT. L. REV. 151, 159-160 (1971).

[6]It has been suggested, though never required, that a judge who elicits a factual basis for a proffered guilty plea but who later rejects the plea should excuse himself from further involvement in the case. *United States v. Gallington,* 488 F.2d 637, 639 (8th Cir. 1973), *cert. denied,* 416 U.S. 907.

is absolutely forbidden in many jurisdictions. (*See, generally,* Resp. Brief at 18, n. 14-16.)

Hence the defect in the respondent's analysis of *Jackson* is its failure to take proper account of the crucial criterion of necessity. The analogies he offers in support of his position, therefore, are entirely inapposite to the issues at bar.

III.

ALTHOUGH THE INTERPRETATIONS OF THE RECORD OFFERED BY THE PETITIONER AND THE RESPONDENT DIFFER MATERIALLY, BOTH NEVERTHELESS REQUIRE REVERSAL IN THIS CASE.

The petitioner and the respondent have now offered significantly different interpretations of the record before the Court. The petitioner has argued that his interpretation demands reversal and the vacatur of his guilty plea. The respondent does not necessarily disagree with that conclusion (*see,* Resp. Brief at 33 n. 28), but argues instead that the "more logical" interpretation he offers demonstrates that the petitioner's guilty plea is valid and must stand.

In reply, the petitioner submits that not only is the respondent's construction inconsistent with the record, but, even if it were accurate, reversal would nevertheless be required. Moreover, even the respondent tacitly agrees that, at the least, a remand for an evidentiary hearing is necessary.

A. The Respondent's Interpretation Is Inconsistent With the Record.

The interpretation offered by the respondent is as follows:

> After. . . the pre-trial (*Wade*) identification hearing, petitioner was informed through counsel that if he pleaded guilty to robbery in the first degree, the court would sentence him to a term of imprisonment of six to twelve years. At the same time, Mr. Justice Held informed defense counsel that, if petitioner were convicted after trial, the court would impose a sentence of twelve and one-half years to twenty-five years, "(s)ubject of course of me (*sic*) reading the probation report (since) (i)t is a practice in my court when there is an armed robbery, to give. . . a maximum sentence, unless there are mitigating circumstances." (App. 28). Defense counsel and petitioner discussed the offer, which was ultimately accepted (App. 28).
> (Resp. Brief at 33.) (Footnotes omitted.)

This rendition simply cannot be reconciled with the record.[7]

[7]That disputed interpretations exist at all, of course, results from the fact that the actual plea negotiations were conducted off the record. Presented for review here is the transcript of a recorded exchange engaged in by the judge, counsel and the petitioner immediately prior to sentencing. In that exchange, accounts were given of the plea negotiations in an attempt to reconstruct the circumstances under which the guilty plea was offered.

In that light, it is instructive to examine one of the primary arguments now advanced by the respondent in this Court: "The participation of the judge in plea negotiations, whether or not he later presides at trial, is consistent with due process when conducted in open court in the presence of the prosecutor, and defense counsel and his client, *and when the proceedings are transcribed for appellate review. . . . The record and defense counsel protect the accused from an overbearing judge. Any improprieties in the proceedings will be readily discernible in the record.*" (Resp. Brief at 14.) (Emphasis supplied.)

Under the very test proposed by the respondent, then, the trial judge's participation in the unrecorded plea negotiations below was not "consistent with due process."

In an essentially uncontradicted account (*compare, United States v. Herron*, 551 F.2d 1073, 1077 [6th Cir. 1977]), defense counsel recalled that after a bench conference the judge had said he "would give six to twelve with the District Attorney's approval." (App. 28.) Counsel continued,

> I came back and said to my client six to twelve and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> . . . We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at that time I did, Judge. I gave him that warning. (App. 28.)

A fair reading of this record demonstrates that two messages, rather than one, were sent to the petitioner by the trial judge. The first comprised the offer of a six to twelve year sentence to which the petitioner "said no." The second, alluding to the maximum sentence and viewed by counsel as a "warning," was delivered at the direction of the judge "prior to [the] time" the petitioner "arrived at the six to twelve year sentence," not prior to the time "he said no" to it. Thus, the petitioner initially rejected the plea offer and decided to accept it only after having received the warning from the judge.

Moreover, neither the affidavits submitted in support of the motion to withdraw the plea nor the separate accounts offered by the petitioner and his counsel made mention of any sentencing policy announced by the court. In fact, the one and only reference to any sentencing policy was made by the judge after counsel accused him of having threatened to

impose a twelve-and-a-half to twenty-five year term upon conviction after trial. The judge explained:

> It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. (App. 28.)

There is no suggestion in this comment that the existence of any "practice" had been made known to the petitioner or his counsel during plea negotiations. Interestingly, for the first time in this portion of the colloquy, the judge speaks in the present tense. Were the respondent's interpretation correct, the judge's statement would undoubtedly have begun with wording like: "I told you that it is a practice. . ." The record, then, makes plain that the reference to a sentencing practice was either an afterthought or a statement of policy unannounced during plea negotiations.[8]

Hence, the interpretation now offered by the respondent is inconsistent with the record and should be disregarded.

B. Even Under the Respondent's Interpretation of the Record, The Conduct of the Trial Judge Below Violated Due Process.

The respondent agrees that,

> Certain statements made by the court are by their nature inherently coercive, *e.g.*, "if you plead guilty, you will receive the minimum sentence; if you go to trial you will be entitled to no consideration from the court". . . . (Resp. Brief at 29-30.)

[8]It is of little significance that the judge may have said that the imposition of the maximum sentence upon conviction after trial would be subject to a reading of the probation report. A judge in New York is obligated by law to order and consider a probation report prior to imposing sentence. *See*, N.Y. Crim. Pro.L., Sec. 390.20(1) (Consolidated Laws of New York, Book 11A, McKinney's Supp. 1978); *People v. Selikoff*, 35 N.Y. 2d 227 (1974), *cert. denied*, 419 U.S. 1122. He is not obligated to follow its recommendations, however.

However, the respondent sees a difference of constitutional significance between that statement and the warning he claims was delivered below, *viz.*, that a rejection of the offer carrying a six to twelve year sentence would trigger, upon conviction after trial, the judge's policy of imposing a maximum sentence - here more than twice as severe - in the absence of undefined "mitigating circumstances." Unlike the respondent, the petitioner can perceive no difference of constitutional significance in the two instances.

First, the very announcement of a policy of imposing a maximum sentence upon conviction for armed robbery is constitutionally suspect for precisely the reason that, in direct violation of the principles of *Jackson*, it needlessly encourages the defendant to plead guilty. *United States v. McCoy*, 429 F.2d 739, 742-743 (D.C. Cir. 1970). Moreover, even assuming the constitutionality of such an announcement, and assuming further that the judge in fact adhered to any such sentencing policy, the timing of the announcement reveals its true purpose.[9]

There is no indication anywhere in the record that the alleged practice was made known to the petitioner or his

[9]The question of whether the judge did indeed have any such sentencing policy is not free from doubt. The petitioner actually pleaded guilty to the crime of armed robbery but received less than half the maximum permissible sentence. Therefore, if the judge did have a policy, he did not accurately represent it. His policy was not triggered by a conviction for armed robbery but rather by a conviction for that crime *after trial*. Hence, the policy turned not on the nature of the crime but on the defendant's demand for a jury trial. Such a practice is constitutionally unacceptable. *Cf. North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969).

counsel when the case first appeared in the judge's Trial Part - this although both indictments charged the crime of armed robbery. That the first announcement of the policy should be made simultaneously with a plea offer carrying a sentence of less than half the maximum demonstrates clearly that the judge's intention was to induce the reluctant petitioner to plead guilty.[10] That purpose was improper. *Euziere v. United States,* 249 F.2d 293 (10th Cir. 1957).

Plainly, then, even under the respondent's strained reading of the record, the judge deliberately employed his sentencing power to induce the unwilling petitioner to tender a guilty plea, and he did so by threatening to penalize the petitioner's reliance upon his legal and constitutional right to stand trial. The message of *North Carolina v. Pearce,*[11] *United States v. Jackson,*[12] *Chaffin v. Stynchcombe,*[13] and *Bordenkircher v. Hayes,*[14] is that such conduct is patently unconstitutional. *Corbitt v. New Jersey,* ____ U.S. ____, ____, 99 S. Ct. 492, 504 n. 7 (1978) (STEVENS, J. dissenting in an opinion in which BRENNAN, J. and MARSHALL, J. joined).

The petitioner contends that the bald judicial threat he discerns in the record requires reversal. It is respectfully submitted that the respondent's own interpretation of the same record requires no less.

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[10]The petitioner, of course, had earlier rejected a sentence offer of three-and-a-half to seven years, a term only slightly greater than the very minimum he could have received on the reduced charge of robbery in the second degree.

[11]395 U.S. 711 (1969).

[12]390 U.S. 570 (1968).

[13]412 U.S. 17 (1973).

[14]434 U.S. 357 (1978).

C. The Respondent Tacitly Concedes That, At the Very Least, This Case Must Be Remanded For an Evidentiary Hearing.

The petitioner interprets the record as demonstrating that, following the *Wade* hearing, a six to twelve year sentence offer was extended and rejected, and that upon learning of the rejection the judge in unadorned terms issued a warning that if the petitioner were convicted of the same offense after trial, "he is going to get twelve and a half to twenty-five." (App. 28.) The respondent candidly agrees that "if the petitioner's interpretation of the sequence of events is the correct one, he may well be entitled to the relief he seeks." (Resp. Brief at 33 n. 28.) The respondent does not contend that the petitioner's interpretation is unreasonable, but maintains only that his is "the more logical." (*Id.*)

Accordingly, since the respondent agrees that there is an interpretation of the record which is not unreasonable and under which the petitioner may be entitled to relief, he has tacitly conceded that, at a minimum, an evidentiary hearing is required to determine which of the proffered interpretations is accurate. *Cf., McMann v. Richardson,* 397 U.S. 759 (1970); *United States ex rel. McGrath v. LaVallee,* 319 F.2d 308 (2nd Cir. 1963); *People v. Earegood,* 12 Mich. App. 256, 162 N.W. 2d 802, 815 (Ct. App. Mich. 1968), *rev'd,* 383 Mich. 82 173 N.W. 2d 205 (1970). The petitioner, for his part, sees no need for a hearing, first because he believes his interpretation to be the only one fully consistent with the record, and second because he maintains that he is entitled to relief even if the respondent's interpretation is accepted by the Court. (*See* Sections 3A & 3B *ante.*)

IV.

THE FACTORS RELIED ON BY THE RESPONDENT TO DEMONSTRATE THE VOLUNTARINESS OF THE GUILTY PLEA ARE CLEARLY OUTWEIGHED BY THE EFFECT OF THE JUDGE'S COERCIVE CONDUCT.

The respondent contends that the relevant circumstances surrounding the guilty plea demonstrate that it was voluntarily offered. Specifically, he points to the petitioner's statements during allocution, the fact that he had previously withdrawn a guilty plea, the introduction of damaging evidence at the hearing which preceded the plea, the petitioner's background and experience, the reports of his Probation Department interview and psychiatric evaluations, and, finally, what the respondent condemns as "an effort on [petitioner's] part to thwart the prosecution of his two indictments." (*See,* Resp. Brief at 38-43.) The respondent concludes that "[w]hat emerges from the record is a shrewd and experienced plea bargainer rather than an intimidated and coerced victim of an overbearing judge." (*Id.* at 44.)

In point of fact, this "experienced plea bargainer" had shrewdly declined an offer carrying a three-and-a-half to seven year sentence only to be compelled later to accept a term of imprisonment nearly twice as great in order to avoid a threatened sentence twice greater than that. Further, his ultimate decision to plead guilty was clearly not a measured response to his assessment of the evidence against him; he had flatly rejected the very same plea offer after that evidence had been presented. Moreover, from the time his case was

first transferred to the Trial Part, the petitioner had apparently insisted that he wanted to stand trial. For some reason, however, the judge seemed intent on discouraging that desire.

A criminal defendant, no matter how shrewd, calculating or manipulative, will always be outmatched by any judge who, wielding his awesome power and position, chooses to enter into an adversarial struggle with him. However, there can be no legitimate excuse for such a struggle, especially when all the judge need do to avoid it is to afford the defendant his constitutional right to a trial. *Cf. People v. Heddins,* 66 Ill. 2d 404, 362 N.E. 2d 1260, 1263 (Sup. Ct. Ill. 1977) (Dooley, J., concurring). The judge below appeared determined to persuade the petitioner to forego that right, and to that end, he issued the threat that conviction after trial would bring the maximum sentence permissible. His efforts to induce the plea were successful; they were also unconstitutional.

Because of his vastly superior position and powers, the judge's coercive intervention in the plea bargaining process under the circumstances at bar outweighed any other factor, or combination of factors, suggesting that the petitioner's guilty plea was voluntary. The judge's threat was calculated to, and did, overwhelm the petitioner's choice. The guilty plea that resulted was therefore involuntary as a matter of law. *Euziere v. United States, supra.*

CONCLUSION

The respondent fears that to adopt the petitioner's reasoning in the case at bar "would cripple any viable system which encourages guilty pleas by offering substantial benefits." (Resp. Brief at 37.) That assertion is simply untrue and is belied by the experience of the federal courts and of the many state jurisdictions which prohibit judicial participation in plea negotiations.

Plea bargaining, and the attendant offering of benefits in return for pleas, will continue. However, negotiations will be conducted, as they should be, between prosecutors and defense counsel who "arguably possess relatively equal bargaining power." *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Opinion of BRENNAN, J. in which DOUGLAS, J. and MARSHALL, J. joined). Trial judges will simply be restored once again to their proper role in our criminal justice system.

The order below should be reversed.

Respectfully submitted,

STEVEN W. FISHER
BARRY GENE RHODES
RHODES & FISHER
16 Court Street, Suite 1210
Brooklyn, New York 11241
212/624-3784

Counsel to the Petitioner